

**United States Department of Labor
Employees' Compensation Appeals Board**

L.C., Appellant)
and) Docket No. 12-395
DEPARTMENT OF HOMELAND SECURITY,) Issued: September 17, 2012
U.S. COAST GUARD, Kodiak, AK, Employer)

)

Appearances:
Appellant, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2011 appellant filed a timely appeal from the September 1, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the pay rate of his schedule award. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly determined appellant's pay rate.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 10, 2008 appellant, then a 45-year-old lead firefighter, sustained a traumatic injury in the performance of duty when he slipped and fell on ice.² The record indicates that he received continuation of pay and used compensatory time until his right knee surgery on October 20, 2008. OWCP paid compensation for disability beginning October 26, 2008.

OWCP based appellant's compensation on his pay rate at the time disability began. A January 6, 2008 Form SF-50 established he was a GS-0081 firefighter with an annual salary of \$45,103.00. OWCP determined that appellant's hourly pay rate was \$16.37, that his biweekly base pay (106 hours) was \$1,735.22, that his extra pay rate was \$24.56, and that his biweekly extra pay (38 hours) was \$933.28. Adding his biweekly base pay and biweekly extra pay, OWCP divided by two to find a weekly pay rate of \$1,334.25. Adding \$216.84 for a 25 percent nonforeign area cost-of-living allowance (COLA), it concluded that appellant's weekly pay rate was \$1,551.09.

On January 25, 2011 OWCP issued a schedule award for appellant's right lower extremity based on a weekly pay rate of \$1,551.09. On September 1, 2011 OWCP's hearing representative affirmed the calculation of his pay rate. She reasoned that hours worked by firefighters in excess of 106 biweekly were defined as overtime and that FECA barred the inclusion of overtime. The hearing representative also characterized the 25 percent COLA as an increment for Sunday pay. Citing to a procedure relating to Fair Labor Standards Act pay for firefighters, she found that appellant was not entitled to overtime pay for the additional 38 hours, but nonetheless affirmed OWCP's calculation of the schedule award pay rate.

On appeal, appellant noted a reference to a Form SF-50 dated January 6, 1998 and questions its relevancy. He asks whether it is possible that the pain and tenderness in his right hamstring, which developed after surgery, is related to his injury, surgery or postsurgery rehabilitation. Appellant argued that OWCP neglected to take into account 38 hours of COLA in its calculations.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.³

² OWCP accepted appellant's claim for right lateral collateral ligament sprain, derangement of the right lateral and medial meniscus and current tears of the right medial and lateral meniscus. It authorized surgery. Appellant had previously sprained his right knee in 1998 when he pulled a hose and slipped in the snow-covered mud. OWCP File No. xxxxxx090.

³ 5 U.S.C. § 8102(a).

Under the Federal Firefighters Overtime Pay Reform Act of 1998, which is codified at 5 U.S.C. § 5545b, for firefighters with regular tours of duty generally consisting of 24-hour shifts, the pay rate for compensation purposes is determined as follows:

- (a) Annual salary / 2756 [53 hours of regular pay per week x 52 weeks] = firefighter hourly rate.
- (b) Firefighter hourly rate x 106 hours = biweekly base pay.
- (c) Firefighter hourly rate x 1.5 = firefighter extra pay rate.
- (d) Firefighter extra pay rate x number of hours in regular tour in excess of 106 hours = biweekly firefighter extra pay.
- (e) (Biweekly base pay + biweekly firefighter extra pay) / 2 = weekly pay rate.

Most 24-hour shift firefighters have a regular biweekly tour of 144 hours (six 24 hours shifts) consisting of 106 regular hours and 38 “firefighter overtime” hours; thus 38 hours (144-106) would be used in step (d) above.⁴

OWCP has determined administratively that locality pay or COLA will be included in computing an employee’s pay rate.⁵

ANALYSIS

Appellant does not take issue with the percentage of impairment reflected in his January 25, 2011 schedule award. He appeals, instead, on the grounds that OWCP’s hearing representative erred in determining his pay rate.

OWCP procedures, noted above, spell out the rules for determining the pay rate of GS-0081 firefighters. At the time disability began in October 2008, appellant’s annual salary was \$45,103.00. His hourly pay rate was \$45,103.00 divided by 2756 hours (53 hours of regular pay a week times 52 weeks) or \$16.37. Appellant’s biweekly basic pay was \$16.37 an hour times 106 hours or \$1,735.22.

Appellant’s extra pay or “overtime” rate was 1.5 times his hourly rate or 1.5 times \$16.37 a hour or \$24.56 a hour. His biweekly extra pay was therefore \$24.56 an hour times 38 hours or \$933.28.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8.d. (March 2011). Public Law 106-554, enacted in December 2000, contained language establishing that for GS-0081 firefighters, those hours in excess of 106 biweekly should not be considered “overtime” for purposes of computing pay under 5 U.S.C. § 5545b. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6.b(13) (March 2011).

⁵ *Id.* at Chapter 2.900.6.b(19).

Appellant's biweekly basic pay and biweekly extra pay totaled \$2,668.50. Thus, his firefighter weekly pay rate was \$2,668.50 divided by two, or \$1,334.25, which is what OWCP calculated.

The Board finds that OWCP properly followed procedures to calculate appellant's firefighter weekly pay rate of \$1,334.25. The question that remains is how OWCP should have applied the 25 percent nonforeign area COLA.

OWCP applied COLA by dividing appellant's annual salary by 52 weeks and multiplying the remainder (\$867.37) by 0.25, for a COLA of \$216.84 a week. Appellant argues that this method neglected his 38 hours of biweekly extra pay. His argument is that OWCP should have applied the 25 percent nonforeign area COLA to his firefighter weekly pay rate of \$1,334.25, as calculated under OWCP procedures, the pay rate that reflects his entire regular tour of duty.

Section 550.1305 of Title 5 of the Code of Federal Regulations provide that the sum of pay for nonovertime hours that are part of a firefighter's regular tour of duty (as computed under § 550.1303) and the straight-line portion of overtime pay for hours in a firefighter's regular tour of duty is treated as "basic pay" only for the following purposes: ... "(4) Cost-of-living allowances and post differentials under section 5941 of title 5, United States Code." Section 5941 of Title 5 of the United States Code provides allowances based on living costs and conditions of employment for employees stationed outside the continental United States or in Alaska, and states that the allowance may not exceed 25 percent of the rate of basic pay.

OWCP has not adequately addressed this issue. It noted the 25 percent nonforeign area COLA but did not apply it according to 5 C.F.R. § 550.1305(4). Instead, OWCP simply divided appellant's annual salary by 52, thereby excluding his extra pay or the 38 hours in his regular biweekly tour in excess of 106. OWCP's hearing representative misread Chapter 2.900.6b(13): those hours in excess of 106 biweekly should not be considered overtime, and therefore are not excluded from the computation of pay rate. OWCP's worksheet specifically identifies the 25 percent adjustment as a COLA, not an increment for Sunday pay.

The Board will set aside OWCP's September 1, 2011 decision on the issue of pay rate and remand the case for further action. OWCP shall issue an appropriate final decision on the proper application of the 25 percent nonforeign area COLA, one that provides a statement of reasons.⁶

OWCP's hearing representative's reference to a January 6, 1998 Form SF-50 was simply mistaken. As the imaged document is not as clear as it could be, the date might appear to be "1/06/98." A close examination, however, shows it to be "1/06/08." The pain and tenderness appellant describes in his right hamstring relate to a possible consequential injury, one OWCP has not accepted, and is therefore not relevant to the decision on appeal.

⁶ See 20 C.F.R. § 10.126 (the decision of OWCP shall contain findings of fact and a statement of reasons).

CONCLUSION

The Board finds that this case is not in posture for decision. Further development is warranted on the issue of pay rate.

ORDER

IT IS HEREBY ORDERED THAT the September 1, 2011 decision of the Office of Workers' Compensation Programs is set aside on the issue of pay rate. The case is remanded for further action.

Issued: September 17, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board